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THE ATTAINT.

THE practice of attainting a jury was the method by which for centuries the English law corrected an erroneous finding of fact by the body of men who, in course of time, came to be called a jury. Today this necessary corrective of judicial administration is very inadequately performed by the judge or judges presiding over the trial. The proceeding is now called a motion for a new trial. The new trial is inadequate for the reason that it does not, as did the attain, substitute a correct verdict for the one given. It merely reverses or sets aside the former verdict and restores the party prejudiced to his cause of action or defense, as the case may be. It wipes out the former trial and requires the whole trial to take place again. As a matter of fact, the demonstration of a necessity for a new trial ought to carry with it the demonstration of what would be a correct verdict and judgment, and to save useless expense that judgment should be entered.

It is the purpose of this article to explain the history of the proceeding by attain and to show the long development whereby the English law arrived at the substituted practice of granting a new trial. It will appear that the new trial is the logical successor of the attain and was induced not by any inadequacy in the attainting remedy, but by a gradual change in the function of the jury. This change was a progression from the original idea that the twelve men who assist the court in arriving at facts, are the witnesses and the only witnesses of the facts to the later conception that a jury is a body who perform the judicial function of hearing the evidence in open court, and from that evidence, with the aid of information from the judge as to the law applicable to the facts developed in evidence, make up a verdict by applying the law to the evidence as it has been given.

During the last two centuries at least and ever since English lawyers completely lost touch with the history of the law, it has been customary to speak of the attaint as a barbarous and anomalous proceeding. Thus, Chief Justice SHAW, one of our greatest judges, with all the solemnity of a judicial wiseacre, has said of the attaint:¹ "This like many anomalies of a like kind * * * shows how little the true nature and principle of jury trial in its perfection were understood * * *. But these abuses and anomalies have long since passed away, and both in Great Britain and in this country, the principle of jury trial is well understood."

But the author of the *Mirror of Magistrates*,² written late in the reign of Edward I or early in that of Edward II, complains in enumerating the various prevalent abuses in the administration of law: "It is an abuse that writs of attaint are not granted in the chancery without difficulty, for the attaint of all false jurors, as well in all other actions, personal, real or mixed, as in the petty assizes." To this author, who is writing in the period from 1300 to 1320, the attaint seems to be a very desirable procedure.

It is easy to understand this apparent contradiction as soon as we ascertain that jury trial as it existed in the early days of the common law and was known to the *Mirror*, was a wholly different proceeding in theory and in practice from the jury trial that we know and that Chief Justice Shaw had in mind. The attaint was as applicable to former jury trial as it is inapplicable to our system. It will appear that the practice was under all the circumstances an effective remedy, and that the legal historians have not done justice to a reasonable proceeding.³

The process of attaint is wholly a matter of procedure, but legal historians have been compelled to recognize that the historical life of any system of law is found in its procedure. To trace the development of English law is emphatically to trace the history of its procedure. English law has been called "a commentary upon writs." To theoretical lawyers, the law can very easily be divided between substantive and adjective law. But, as a matter of fact, there is not now and there never has been such a division except as an abstrac-

¹ *Comm. v. Anthes*, 5 Gray 185, 198, quoted in Thayer, *Treatise on Evidence*, 148.

² *Mirror of Magistrates* (Sel. Soc.) 164.

³ See 1 Holdsworth, *Hist. of Eng. Law*, 162, 163, to the effect that attaint was a "clumsy" and "never effective" remedy, but he is simply talking with the disregard of changed conditions that was exhibited by Coke whom he so much admires. See *Essays in Legal History of 1913*, Oxford, p. 297.

tion. Procedure and the available remedies have constantly operated to limit rights and duties. If a theoretically assumed and desirable right or duty is not associated with a reasonably adequate remedy, such right or duty, for all purposes of the practical lawyer, does not exist. It is also true that actual changes in the substantive law have frequently been stated and necessarily stated in terms of the remedial law. These changes have resulted in two ways: one is by legislation, the other is by judicial decision and the practice of courts. The tracing of the history of attaint will show both methods in full operation.

Writers upon law have not been able to say when the proceeding of attaint arose. As early as the reign of King John in 1202, it is found as an ordinary practice presupposing an antecedent and settled existence. We can point to no statute or legislation which instituted it, any more than we have been able to find any statute which began the practice in England of adding twelve men to a court to find the facts. The obscurity of the beginnings of attaint has led to a dispute as to whether the practice of attaint existed at the common law, that is to say, existed by custom or was the creature of legislation. Blackstone⁴ notices this dispute. Coke,⁵ who was generally far astray in his legal history, contends that the attaint in all kinds of actions, except real actions, existed at the common law. He says that the reason why it was not given in real actions was that a higher remedy could always be invoked. But the reason given is nonsense, for when the attaint originated, the courts were innocent of any distinction between real and personal actions and the action of debt was precisely as real as, and was almost covered by the very words of, a writ of right for land. Both writs stated that the plaintiff was being deforced, in the one case of land, in the other of a debt. Yet Coke is correct in saying that attaints existed at the common law, for we can find the original precedent.

It is a curious fact that the one case which throws light on the beginning of the practice is a case whose importance has not been appreciated in this connection either by Coke, Blackstone, Reeves, Thayer, Pollock and Maitland or Holdsworth. It will appear that, as is usual in such matters, the dispute as to origin is about the meaning of words not facts. It arises from not defining what is meant by "existing at the common law." The fact is evident that the

⁴ 3 Commentaries, 403.

⁵ 2 Inst., 130, 237. Reeves, 2 Hist. of Eng. Law 33 (Finlason's ed.) denies Coke's assertion. Both of them are wrong if they are speaking of the same thing, which is doubtful.

practice of attain, namely, the reversal of a verdict of twelve men with the punishment of the twelve by another body of men arriving at a different verdict, is the creature of the common, customary law, while the sphere of its operation and the actions in which it could be invoked, although originally defined by the common law, came through accidental circumstances to be defined wholly by legislation. But in the sense that the action of debt, the writ of right, the writs of entry, the use of a jury, exist at the common law, the practice of attain was given and provided by the common law without the aid of any statute whatever.

The case that I have referred to is found in Bigelow's *Placita Anglo-Normannica*⁶ where it has been extracted from the monkish writings called *Anglia Sacra*. Sometime within a few years after 1072, which was only six years from the Norman Conquest, a dispute arose between Pichot, the king's sheriff in Kent, and Bishop Gundulf of the see of Rochester. The Bishop claimed lands as the property of his diocese, the sheriff had taken possession of them as belonging to the king. The issue, no doubt, was whether, when William the Norman conquered the realm, those lands were owned and enjoyed by the church or by some Anglo-Saxon thane who had been in Harold's army. Perhaps, too, the sheriff was ready to consider an Anglo-Saxon bishop as not entitled to hold lands against the king. But the Bishop, with the power of the church behind him, was a different being from a Saxon landholder. He brought an action against the sheriff, claiming that the latter was deforcing him. The king, ready to do justice even against himself, issued his writ commanding that "all the men of that county should be assembled and by their judgment it should be proven (*probaretur*) to whom the land really belonged." The writ designated Odo, Bishop of Bayeux, to preside over the court. His none too faithful portrait is still to be seen on the Bayeux tapestry, where he appears upon his charger, but in the wholly unclerical attitude of leading his Norman Knights at the Battle of Hastings.

The words of this account will repay close examination. But first a word is to be said regarding the judge designated to preside. The Bishop of Bayeux in Normandy, was William the Norman's half brother who at this time was the king's chief justiciar and a great territorial magnate in Kent. To his elder brother, in the contests with his nobles and with the King of France, this younger brother had lent valiant aid. He had come to the muster for the invasion

⁶ P. 34.

of England with forty ships and many knights. At Hastings he led his knights in battle, though the Bayeux tapestry, out of deference to his priestly character, puts in his hand a *baculus* or baton, a somewhat incongruous weapon to supplement his full armor and his armored war-horse. He was rewarded with many lordships in Kent of the dispossessed Saxons, and from 1072 to 1079, when this case occurred, he was chief justiciar. During the king's absence in Normandy he was practically regent of the kingdom. In his judicial capacity of chief justiciar (*capitalis justiciarius*) he presided over the court.

By "the men of the county," who were to be assembled to make proof in court, we are to understand those freeholders who in Anglo-Saxon days had assembled as the shire moot or county court. But in this case and thus early after the Conquest, we note a change in the function of the men assembled in the county court. The Anglo-Saxons who made up the court under Edward the Confessor, rendered the judgments; in their language they were "doomsmen" and spoke the "doom." But by this writ they are only to prove (*probaretur*), to be witnesses to inform the king's justiciar, who is to render the judgment. This conception of the function of jurors remains today, after the lapse of many centuries, the true conception of the jury. Just as formerly as witnesses, now as judicial officers, they find the facts so that upon their finding the judge of the court may enter the proper judgment, but the judgment is the adjudication of the judge, not of the jury.

The county court was assembled in pursuance of the writ, the chief justiciar presiding; but in fear of the king's sheriff, the men of the county said that the land was the king's. The story proceeds that "since the Bishop of Bayeux, the presiding judge, did not believe what they said, he directed the county court, if they really knew what they said to be true, to select twelve of their number to confirm upon oath what the whole body of the court had said."

It will be noticed that here is probably the first instance in English legal history of twelve sworn men being selected in a court to make a conclusive statement of facts upon which the judge is to act in rendering a judgment.⁷ These twelve men were selected; they withdrew to consult but they, too, were greatly terrified by a message from the sheriff, and came back and swore that what the county court said was true and thereupon, it may be inferred, judgment was

⁷ It is not questioned that the royal inquest of twelve was commonly used in the Domesday Survey, but those were not judicial proceedings but rather administrative. If the Survey began in 1085, which is not likely, this case antedates Domesday.

given against the Bishop of Rochester, for the land remained to the king.⁸

This case, even if it went only so far, would be instructive on the changes in judicial administration initiated by King William, but the monkish chronicler, with peculiar unction, goes on to tell us that a certain monk now came forward and showed to the Bishop of Rochester that the verdict was unquestionably wrong and that one of the men of the twelve knew it to be so, for he held his own lands under the title of the church. The bishop took the monk to the chief justiciar, who heard the statement. The bare details of the account do not show us the Norman's wrath at learning that despite his better judgment he had allowed himself to be imposed upon and the church to be robbed of its lands by the false words of a lot of Saxon churls, but there is the scene of his bringing one of the twelve before him, and of the man in fright throwing himself at the justiciar's feet and confessing that he was a perjurer. Then another of the twelve was called in and confessed. The rest of the twelve were brought before the chief justiciar and he convened many of the greater barons of England. They, both French and English, having heard the matter, adjudged the jury to have been perjured and to have made a false oath.

It is at this point that the Norman's practical sense enabled him to invent the attain. No doubt precedents and practice existed in Normandy for convicting of false swearing a royal inquest of twelve men, but it was unheard of that a solemn judgment, entered on the false oath, could be set aside and a contrary judgment made.⁹ Possibly if it had been in Normandy, the chief justiciar could not have done what he did, but he unhesitatingly reversed the former judgment and gave another whereby Gundulph of Rochester received the lands, and the jury were fined three hundred pounds to the king.

The above, we may safely assume, is the original precedent for the practice of attain. Here we have it in all its essential features. The procedure is more effective than a new trial. Instead of stopping with the restoration of the cause of action *ab integro*, attain goes further and enters the verdict that the former body should have rendered. But it is not to be thought that at that early day the at-

⁸ "Sed cum illis Baiocensis episcopus, qui placito praeerat, non bene crederet, praecipit ut si verum esse quod dicebant scirent, ex seipsis duodecim elegerent, qui quod omnes dixerant jurejurando confirmarent. Illi autem cum ad consilium secessissent, et inibi a vicecomite per internuntiam conterriti fuissent, revertentes verum esse quod dixerant juraverunt. Quo facto, terra in manu regis remansit."

⁹ See Thayer Treat. Evid. 141 to the effect that the attain was unknown in Normandy.

taint was so called. Even two hundred years later, the attaint is called in the Latin of Bracton by the orthodox Latin word *convictio* or conviction. But somewhere about the time of Bracton, in the French used as the language of the courts, the proceeding was called *ateinte*. The latin writers of the court records gradually gave up their word *convictio*, but in striving to make *ateinte* a Latin word, they fell into the error of mixing *ateindre*, to strike or to attack, with *atteindre*, which means to stain, and the word *attincta*, a staining, emerged for the Latin of *ateinte*, and thus today our word attaint, both in spelling and meaning, perpetuates the error of the scribes; but men who were capable of translating the English "fresh force" into "*frisca forcia*" were not likely to be intimidated by a simple word like *ateinte*.

We may, however, confidently assert that this could not have been a solitary instance and that there was enough of subsequent precedent to keep this proceeding alive. This must be so since a hundred years later we find the proceeding in existence ready to be applied to the new remedies of novel disseisin and the other three petty assizes. But before we leave the Bishop of Bayeux, we ought to think of the debt of English law to this hard fighting and adventurous Norman. The full application of the remedy of giving the correct judgment despite the former judgment was a new device invented on the spot. His practical sense of justice saw the futility of convicting the jurors while leaving the unrighteous judgment in effect. It may be that his Norman sense of justice according to law—that admirable attribute unknown among the town-meeting courts of the Anglo-Saxons—was stimulated by the churchman's zeal for his church, but he devised a practice that for five hundred years was to rule the English law. So much ought to be said for this long forgotten man whose restless spirit led him to prepare, a few years later, to go to Rome to purchase the papacy. But whether he died at Palermo or at the siege of Antioch, as an exile or as a warrior for the tomb of Christ, English law owes to him the invention of the remedy of attaint.

During the long reign of Henry I, the Conqueror's son, when the king's justices were making their perambulations of the country and sitting in the country court or hearing cases in the exchequer, they used in some instances the same procedure of finding by the oath of twelve men what were the facts in a controversy. It must be taken as certain that the king's justices made the judgments wherever they were present in court. We may suppose that in some cases the proceeding of attaint was used, for dishonesty and perjury un-

happily belong to every age. No doubt these activities of the king's justices and it may be attainds, added to the cry that went up under Henry I for the restoration of the good old laws of Edward the Confessor, absurd as they were, and for the freeing of the popular courts from the domination of the king's justices. But after 1136, a civil war ensued between the adherents of Matilda and Stephen, with a consequent interruption of regular government. Probably the institution of the petty and grand assizes, to settle conflicting claims to land, would have come earlier had the orderly development of Anglo-Norman law not been interrupted by the civil war.

It was but twelve years after Henry II, Matilda's son, was in undisputed possession of the crown, that the Assize of Clarendon was enacted. That enactment adopted the body of twelve men as the indispensable adjunct to the trial of rights to the possession of land. But there was nothing new in the adoption of this expedient, the main point was that practically all litigation about land ownership was drawn into the king's courts presided over by the king's justices and there followed the consequent division of the realm into circuits and the regular procession of the king's justices for the hearings upon writs of assize.

In the year 1166, a sitting of the great council of the realm, which was then its legislative body, for a parliament of king, lords and commons was almost a hundred years in the future, was held at Clarendon. The words of the enactment have not been preserved, but from it dates by a mere invention in procedure in fixing the words of a writ, the long recognized distinction in the substantive law between title and seisin. The writ stated that since A had complained that B unjustly and without judgment had disseised A of certain lands, the sheriff was enjoined to summon twelve free and lawful men of the vicinage, to cause them to view the land and to cause them with B to come before the justices to make recognition (to give knowledge) thereof. Thus, the twelve selected by the sheriff were to come before the justices and answer the question as the sole witnesses of the fact, was A seized and did B disseise him unjustly and without judgment?

This writ, called novel disseisin, was afterwards supplemented by another writ called *mort d'ancestor*, where the twelve answered the question, was A's father (mother or uncle) seized at his death and is A his next heir? The writ of ael extended this remedy to the seisin of A's grandfather or grandmother, the writ of bisael to the seisin of the great grandfather and the writ of cosinage to that of any collateral relative of whom A claimed to be heir. The rem-

edies covered not only the seisin of land, but every right growing out of or connected with seisin. The question of the important right to present a parson to a church was covered by the assize of *darrein presentment*, where the question formulated in the writ was who last presented a parson to the church now vacant. The important question of disputes between laymen and ecclesiastics, as to the ownership of land, was to be determined by the assize *utrum*, where twelve men answered the question whether (*utrum*) the land was ecclesiastical or lay fee.¹⁰ It is not relevant here that the latter was in its origin subsidiary to another litigation.

Bracton in his treatise long ago recognized that the word assize had three different meanings. A little more analysis would have shown him twice as many. When the phrase "Assize of Clarendon" is used, it means the legislation enacted at Clarendon, but still older was its meaning of a sitting of the great council at some particular place. In course of time the new remedy was called an assize, and so it is used in the phrases, assize of *mort d'ancestor* or of *darrein presentment*. Then the writ itself was called the assize, or the twelve who were summoned were an assize, and finally the court was called an assize and the session of the court, from day to day, to take the assizes was called the assizes; so today when the judges proceed through the counties to hear the trials upon writs of *nisi prius*, the sittings are called the assizes.

But it may be said that in the case of the *Bishop v. the Sheriff*, there was a plain showing of misconduct in the party as well as in the jury, and that the practice of attainr does not discriminate between misconduct of a party or the jury, whether intimidation, bribery or other improper influencing of the jury be used, and a case of merely mistaken judgment on the part of the jury. There is a difference between wilful and corrupt perjury and bad judgment, but it is a difference in motive, in intention and in mental process. The person injured by the incorrect verdict, is just as much injured by a merely mistaken verdict against him as he is by a corrupt one. The mediaeval mind did not much concern itself with trying to search into the workings of the human heart. If a jury found for a man on any insufficient ground, they looked to results, and very properly so. Even today, where juries almost invariably find against the employer in favor of the employee on wholly insufficient grounds merely because one can better afford to pay than the other can afford to lose, their conduct is just as flagitious in its legal effect as if they

¹⁰ These different writs may be found in Glanville, and reprinted from there in 1 Holdsworth Hist. Eng. Law, 423.

had been bribed. Morally, there is no difference between the motive of finding for a man because he is poor and the motive of finding for a man because he is powerful or a friend, or has paid money. Bracton, however, notices that there is a difference between a false verdict and one that is merely fatuous or ignorant, and says that by the discretion of the judges the punishment by fine may be made to suit the occasion.¹¹ But, generally speaking, to the men of that age there was in fact little difference in incorrect verdicts. The jury or assize were witnesses sworn to tell the truth, to give a verdict, a true saying (*verum dictum*) to the court. The staple of litigation was simple in the sense that it was mainly concerning land. The facts as to deeds or livery of seisin or as to services owed for lands, the status of individuals, rights of common, occupation of land, rents growing out of land, mill rights, the transfers or sales of property, the ownership of property whether real or personal, the boundaries of a man's land, the members of his family, facts as to marriage and birth of children, were bound to be known through the countryside. It was assumed that a man called upon an assize or jury would have little difficulty in informing himself of the facts and there were bound to be some on the jury who would know them. Life was simple, transactions were not involved, simple contracts were unknown, a man's affairs were talked over by his neighbors and if a recognizer did not tell the truth as to his neighbor to the court, when he was called, it was from some improper motive. To the early mediaeval mind there was little difference between a corrupt verdict and an incorrect one. This, at any rate, was the theory and it seems reasonable. But this emphasizes the witnessing character of the jury, just as does the form of their oath, to tell the truth *a tout atrench* (outright), as Sharshulle says in a case to be cited. Today the oath recognizing the jury to be judges, is in a different form. The Norman lawyers made the distinction in the case of the judges. Although they began with the idea that error was a proceeding against a judge, it soon changed its character. But this idea could not apply to witnesses who spoke to the facts which they were supposed to know because happening in the neighborhood. Hence, the constant insistence upon a jury from the vicinage and the strictness as to the venue of actions.

Singularly enough, after the matter of vicinage has become a mere sound; when a very little prior knowledge is a disqualification for service upon a jury; when a jury is expected to decide only from evidence heard in court; when a jury not of the vicinage would

¹¹ Bracton 288b, 289, 292b.

seem to be a more suitable tribunal, we are found blindly insisting on the ancient and then reasonable, but now absurd, requirement of a jury of the vicinage. It is an instance of popular fatuity compared with which the demand under the Norman kings, for a return to wager of law, to the ordeal and to *wer*, *wite* and *bot* and to the haphazard county and hundred courts, was comparative wisdom, and wholly inexplicable until we reflect that underlying both demands is the desire to perpetuate in the courts that popular element, that obedience to public opinion or popular pressure, which in ancient Greece left a man's life, liberty or property at the mercy of the unrestrained vagaries of a majority of the Athenian dicasts, which now insists that the judge must give the jury no advice as to the facts, which has made our judges elective in the hope that they will be the more responsive to popular ideas, and which never has been, and probably never will be, capable of arriving at that highest attribute of humanity, justice in accordance with law.

Premising, therefore, that the lawyers under Henry II were correct in assuming that a verdict false in fact was equivalent to a case of wilful deception, let us return to the Assize of Clarendon of 1166 and the supplementary Assize of Northampton some years later. It is not difficult to understand that after the Civil War and as soon as Henry II found himself ruling a peaceful realm, the pressing necessity in the administration of justice, as it was presented to that ablest of the Angevin kings, was to find a remedy to settle with despatch the titles to land and rights connected therewith. The new remedy of novel disseisin was of that character. The writ issued at the beginning formulated the sole issue, called for no pleadings and no evidence except that of the sworn twelve. Theoretically, it was summary. It went as a matter of course, the sheriff summoned the twelve along with the defendant, the twelve answered the question in dispute, whether the defendant came or not, and thereupon judgment was entered. It was called a novel or new disseisin because a limitation was fixed. By this assize, with the others, the four mentioned above, called petty assizes, only questions of seisin and possession were to be determined, while any higher right was to be tried by a grand assize or a jury of twelve who must be knights, men of substance and standing, of high station, selected not by the sheriff, but by four other knights; or as an alternative to the grand assize, the defendant, at his option, could demand trial by battle.

Upon this foundation began that work which is called judicial legislation, but which more properly defined is the work of the courts to render the uncouth products of legislation reasonable and just in

actual practice. No remedy in its actual application turns out as anticipated. The legislator assumes the burden of prophecy and it is the work of the courts to make the prophecy come true. The writ of novel disseisin is to be returned into a court before the king's justices. Naturally, the first thing to be done is for the court to ascertain what the dispute is about. The claimant states what he claims by means of his countor or lawyer and then the disseisor states what he claims. The writ has proposed the question: Did B disseise A unjustly and without judgment? It may very well be that B disseised A but that he did it with just reason. How far can one go in justifying a disseisin and what will the court permit to be tried in the possessory action? The courts, as usual, compromised. By means of a pleading called an exception, borrowed from the Roman Law through the Canon Law, they permitted the defendant to plead matter of law or fact against the claimant's recovery, upon the inquiry by the court if the defendant had anything to say why the assize should not be taken. Questions were bound to arise not involving the disseisin. These questions the court might be able to decide or if the facts were disputed, the assize present could be called upon to decide them and this was called turning the assize into a *jurata* or jury. In many cases the assize would render a special verdict stating the facts found without passing upon the ultimate fact of just or unjust disseisin. Thus began that long contest between an actual seisin and a better title which fills so large a place in our law, with the further question as to how far a finding on the seisin precluded one from claiming by a higher right than seisin. But however the issue arrived at was finally put before the assize, the question was bound to come, what was to be done when the assize returned the verdict and the party prejudiced by it claimed that the verdict was untrue in fact? To us, where all the evidence is heard in open court, no difficulty is presented. The judge has heard the evidence as well as the jury and he can say, and he can investigate improper influences. But then there was no evidence or witnesses heard, the assize spoke of its own collected knowledge and the judge knew nothing of the facts.

No legislative provision has been found concerning any proceeding to set aside or reverse the verdict (*verum dictum*) of the assize. Glanville of about 1187, a contemporary authority, says nothing of any provision for attainting a verdict in a petty assize, yet soon after the institution of the petty assizes, it is found as early as 1202 that the process of attain is well settled, its procedure fixed and it has been apparently a long used remedy. The silence of Glanville is almost

conclusive in favor of the supposed fact that no provision for attainting a petty assize was contained in the Assize of Clarendon. Yet somewhere and in some way the courts had provided a jury of twenty-four knights to attain the verdict of the assize. The difficulty is to ascertain whence came the provision for such a revising jury as an assize of twenty-four knights. As noted before, the procedure of using twelve men as witnesses to the facts was not new, nor was the practice of attainting the twelve by another set of men a new device. It may be, in spite of Glanville's silence that the Assize of Clarendon did provide for the attainting of an ordinary assize by a verdict of twenty-four knights. But it is too violent an assumption to infer that an attaint was provided by legislation regarding the petty assizes.

The reasonable conclusion seems to be this. Perjury, or what was the same thing, a false verdict, by a petty assize, was an offence against the king's justice. The number of twenty-four would naturally be taken as double that of the assize, and as corresponding to a grand jury of accusation. Knights were selected as of greater standing and importance than ordinary recognitors. But all this was worked out as a judicial remedy by judicial practice alone, so far as we can see. On the available evidence, we are compelled to say that the remedy of attaint was provided for the petty assizes by the custom of the courts and hence exists at the common law.

Singularly enough, though Glanville makes no mention of the *convictio* or attaint of the petty recognitors, he does make the remarkable statement, in the midst of his description of the grand assize on the writ of right, that "a punishment of those who swear rashly in this assize is ordained and very fittingly inserted in this royal institution."¹² These words have been considered to mean that there was a punishment for a false swearing imposed upon the recognitors in the grand assize. But even if that were true, it would not amount to the attaint, for the text of Glanville in the preceding chapter is clear to the fact that there is no way in which to attack

¹² Glanville, Book 2, cap. 19, "*Pena autem in hac assisa temere jurantium ordinaria est et ipsi regali institutioni eleganter inserta.*" This is a curious phrase. The swearing boldly or rashly does not sound like Glanville, nor does the "*eleganter inserta.*" The easy way out of the difficulty is to conclude that this is Hubert Walter's work and that he did not know what he was writing about. It would not be the first time that legal authors have been found in such a predicament. To one who understands that age, the supposition that Norman knights would submit to the attaint is unthinkable. They had insisted upon trial by battle as to the ultimate right in land. They could defend themselves by it against criminal accusations and it is not likely they would submit to a charge of false swearing without a right to appeal to the duel. An edition of Glanville, in the light of our present knowledge, is greatly to be desired.

the verdict of the grand assize. That was always a finality and the essence of the attain is that the verdict attacked is not a finality. It is not likely that an attain would be applied to a verdict of a grand assize when it could not be applied to the alternative duel, nor is it likely that the same process would be applied to a jury of knights as was applied to a petty assize. It is unbelievable that Norman knights at that time, who could defend against a crime by the battle, would submit to be attainted by a verdict of twenty-four knights. As a matter of fact, the attain never was applied to the grand assize. The context in Glanville is followed by the description of the punishment for false oath in a petty assize. It may be that he is confusing the grand assize and petty assize.¹³

On the other hand, it is possible though not probable that the Assize of Clarendon may have provided for a conviction for false swearing by a jury of twenty-four knights whether the assize was a grand or petty assize and the courts, seeing the difficulty of finding the false oath without reversing the finding, may have applied the process to the petty assize but not to the grand assize. If so, there was a provision in the Assize of Clarendon for the attain of the petty assize, but this would in no way invalidate the conclusion that attain existed at the common law. At any rate there is no question but that the conviction and punishment for a false oath was never, as a matter of practice, applied to the grand assize.

The only instance known where it was asked for as against a grand assize is in Bracton's Note Book, in a case dating from 1227.¹⁴

A grand assize upon a writ of right of advowson to determine who had the better right to present a parson to the church of Westersham, the Prior of le Waste or Thomas de Camville, said that Thomas had the better right, because they never saw that the Prior or any of his predecessors had presented a priest to that church. But thereupon came the Prior and said that the grand assize swore incorrectly (*male*),¹⁵ and he pleaded deeds showing a grant of this advowson

¹³ If we may suppose that Hubert Walter wrote the treatise called Glanville, we could conclude that he, being not conversant with the practice of the courts, but knowing that the proceeding for attain was applied to the petty assize, supposed that it was provided for in the Assize of Clarendon and hastily assumed that it applied to the grand assize. This is piling one possibility upon another in a way forbidden by the land law as understood by Coke, who rejects a possibility upon a possibility.

¹⁴ Bracton's Note Book, Case No. 261.

¹⁵ It may be noted that the Prior does not dare to allege a false oath in the usual words of the allegation, but contents himself with using the euphemistic word "*male*" to glose over his charge. The very fact that the word "*male*" (badly) is used, lends some countenance to the supposition that an allegation of false oath against a grand assize

to his predecessor and another writing showing an induction by the Bishop of Rochester of a priest presented by the Prior and monks of le Waste. Thomas, very wisely, declined to answer to the deeds, as they were *res inter alios*, but prayed judgment on the verdict. The case was adjourned in order to consult the king and afterwards another adjournment was taken. No doubt the matter was thoroughly canvassed in the *officina brevium*, to see if the king ought to issue the writ. The result was that on the date to which the last adjournment had been taken, the Prior, knowing he could get no writ, came not. Thomas was quit of the charge of a false verdict and had judgment. There are opposite this case, in what is probably Bracton's handwriting, the words: "Note, that the grand assize is not easily convicted," *i. e.*, attainted.

Bracton wrote his treatise from the cases in his Note Book and he lays it down as undoubted law, that no attaint (*convictio*) lies upon the verdict of a grand assize.¹⁶ This authority remained unbroken. In the year 1292, thirty years later than Bracton's treatise, the report states it for settled law that the attaint does not lie on the verdict of a grand assize.¹⁷ Bracton, in speaking of the attaint, applies it to the petty assizes, and does not suggest or seem to know of any legislative sanction for it. According to him, the attaint came by the common law.

There remains, however, the verdict of the attainting jury itself. Was their decision a finality? One would expect the answer to be in the affirmative from reasonable men. No suggestion is heard that it is not, and in the Year Book¹⁸ two centuries afterward, in the reign of Henry IV, it is stated that no attaint lies upon the verdict of the twenty-four attainting jurors on any matter for which the twelve have been attainted. This must have been the rule, for if the verdict of the twenty-four found in the same way as the twelve, the issue would have been confirmed by two separate juries amounting to thirty-six men. It is not conceivable that the two verdicts would be allowed to be attacked. Yet in a Year Book in the reign of Henry VI¹⁹ it is laid down that if the attainting jury finds upon some collateral matter, *i. e.*, some fact or issue not found or passed upon by the jury of twelve, their verdict upon that particular mat-

was utterly unknown. As powerful a personage as a prior would be certain to use an available remedy; yet his guarded language shows that he may have anticipated a duel with every knight on the grand assize.

¹⁶ Bracton *De Legibus*, 290, 296b.

¹⁷ Y. B. 20-21 Edw. I (Rolls Ser.), 18.

¹⁸ Y. B. 8 Henry IV, f. 23b.

¹⁹ Y. B. 12 Henry VI, f. 6b.

ter may be attainted by a jury of forty-eight. This ruling was probably never the law, for insuperable obstacles may be suggested to such a proceeding, and it is probably a mere flourish.

As we have seen, the only contemporaneous evidence as to the attaint, is silent on the subject of its origin. The first published case after 1166, which refers to the attaint, is in the Select Civil Pleas.²⁰ The record of a case at that time seems to have been entered carelessly. The date of the case is 1202, in the reign of King John, thirty-six years after the Assize of Clarendon. The entry is to the effect that an assize of novel disseisin returned a verdict against Fulmar de Barton. Simon de Kyme, the bailiff of Fulmar, offered the king twenty shillings for a jury of twenty-four knights to convict the assize of a false oath. But his offer was not accepted, for Simon was not the attorney of Fulmar to win or lose (*ad lucrandum vel perdendum*), that is to say, as bailiff he had no authority by a sufficient power of attorney to bind his principal.

This case seems to indicate that the attaint was then well known, the number of the jury and the character of the jurors was fixed, but it also indicates that the granting of the writ was discretionary with the king. Thus thirty-six years after the Assize of Clarendon it was not known that there was any legislative provision giving the writ of attaint in regard to a petty assize's verdict. It seems conclusive against any other inference than that the attaint existed at the common law, but was grantable in the discretion of the king not as a matter of course. The fact that it was grantable in discretion points to its customary origin.

In the same book, in the same year, 1202, is an instance²¹ of an attaint upon the strength of a judicial record and a confession of the jury attainted, without the intervention of the jury of twenty-four knights. The assize had found against a disseisin alleged to have been unjust and without judgment, because, as the assize said, the disseisor entered and took possession in pursuance of a judgment of the Court of the City of London. The assize had probably stated that there was such a judgment without a record produced. The King's Court probably did not enter judgment but called for the record. The London court returned that it had made no such judgment, but that the action referred to concerned services. The assize admitted this and they were at once convicted of perjury by the matter of record and remanded to custody.

²⁰ Select Civil Pleas (Sel. Soc.) case No. 224, p. 90. See also case No. 216, p. 88, where forty shillings were offered for a jury of twenty-four knights, but unsuccessfully.

²¹ Select Civil Pleas (Sel. Soc.) case No. 226, p. 91.

The next publication in which we may look for cases of attaint is Bracton's Note Book containing cases twenty-five years later than 1202, although Bracton's treatise belongs to the period of about 1260. Bracton, with the average lawyer's distrust of the capacity of judges that he knew, went back for his law to the days of the great Pateshull and Raleigh. By this time it appears that the records are more carefully kept, but they have not yet assumed certainty of form; they are in Latin and no French is found in them. There are a number of cases of attaint or, as it was then called, *convictio*. A case may be taken where the attaint was successful.²² Philip de Kyme complained that the recognitors of the assize of novel disseisin summoned and taken before the justices last itinerant in the County of Lincoln, had made a false oath as to a right of common by returning a verdict against his deceased father. The cause of action for attaint, as we would say, had descended to him as heir and the exact issue was whether a part of a marsh, described by metes and bounds, was in the manor of North Kyme or in the manor of Billingham. The jury of twelve had found that the Prior of Catele was seized of the whole manor of Billingham where the marsh was and that Philip's father had no right of common therein.

The Prior appeared and said in effect, that there had been a mis-trial, that the assize had passed upon the freehold and no freehold was claimed, but only a common. The verdict, of course, was wrong, as giving more than the Prior claimed, and the record recites that since the twelve jurors gave to the Prior seisin of a freehold which was not claimed, it was adjudged that the twelve jurors be in mercy *as if* convicted. Thereupon the jury of twenty-four knights passed upon the question at issue, as to where the marsh was and the right of common. They found to the contrary of the assize. Therefore it was adjudged that the twelve be convicted, that Philip recover seisin of his common of pasture and the twelve men be remanded to prison until the court's further order.

The practice seems plain. Although it is apparent that the judgment on the verdict is incorrect, and will be set aside, nevertheless, the attainting jury passes on the issue that had been before the assize and upon this verdict of the twenty-four a new judgment is entered.

The next case²³ to be noted is one where the men on the assize found themselves in a perilous predicament. An assize called to de-

²²Bracton's Note Book, case No. 174.

²³Bracton's Note Book, case No. 285. There were others with Hugo, but the phrase is omitted above.

termine whether certain land in Wycombe was lay fee of Hugo or ecclesiastical land held in free alms (*frankalmoigne* or *libera elemosina*) by the Chapel of Wallingford, an assize *utrum*, had found in favor of the parson of the chapel. Hugo brought attaint, assigning a false oath in the recognitors. The jury of twenty-four came to recognize the fact and the parson, now defendant in the attaint, came and conceded the land to be Hugo's, to hold as he had it before the verdict in assize. But the jury of twelve told a harrowing tale. They said that they were compelled by the justices itinerant to say that the land was free alms of the chapel and that one who pleaded for them before the justices was taken and imprisoned, and they said that they well knew that they had sworn falsely and they put themselves in mercy. The twenty-four knights said that the land was Hugo's and they fixed the damages for his dispossession on the judgment. The record is silent as to what was done to the jurors or the justices itinerant. But it is to be noted that justices itinerant were at this time frequently knights, not justices of the king's court, as will appear from later cases to be cited.

In another case²⁴ a great personage, William Fitz Peter, Earl of Essex, son of the great justiciar Geoffrey Fitz Peter, complained of a verdict in a novel disseisin against him, given in favor of John de Lascelles. The facts as found specially by the jury of twelve, were that William came into possession of the land as heir of Earl Conan and held the land for a month or more in peaceful seisin, but then came a certain Jew and showed that the land was mortgaged (*vadium*) to him by Earl Conan for twenty-four pounds and deeded to him; that the Jew had brought a writ of the sheriff, giving him seisin of the mortgaged land, and upon it, having been put into possession, the Jew had demised the land to John de Lascelles. The jury of twenty-four knights said the same, and therefore both the twelve and the twenty-four found that John de Lascelles did not disseise the said Earl of Essex unjustly and without judgment.

The next case²⁵ to be noted begins with a *praecipe* instructing the sheriff to command four knights to make a record of an assize of novel disseisin that had been taken in their presence. The knights had been justices itinerant, but had returned no record. The record was made and produced, to the effect that the assize had found for the defendants. Upon this record the plaintiff alleged a false oath in the assize because, he said, he held the land as tenant by the curtesy as land of his wife, under whom the defendants claimed, and

²⁴ Bracton's Note Book, case No. 301.

that he had had children by his wife. The defendants admitted this fact, as did the assize, and on the undisputed facts the assize were convicted of a false oath, the claimant recovered the land and his damages from the defendants and the jury paid a fine of fifty marks. Here it is plain that the knights presiding did not know enough law to inform the jury of the estate by the curtesy, but the fine is small to the jurors on that account.

Another *praecipe*²⁶ required Simon de Roppeley and his associate justices to return their record in a novel disseisin which Lambert had brought against Jollan, where the assize had found for Lambert. Upon the return of the record, Jollan assigned a false oath in the assize. The twenty-four jurors said that the facts were that Lambert was an illegitimate son of an elder Lambert. The father had given his bastard son certain land but had remained in seisin and had died seised and thereupon the legitimate son Jollan, as heir, evicted Lambert. And so they said that Lambert was never in seisin to be disseised. Jollan recovered seisin and the jury went to prison. This is an old case of a grantor remaining in possession. In modern law the delivery requisite is of the deed, but in mediaeval law the question was on livery of seisin. But here we begin to see the troubles of a jury. The four knights probably could not tell them the law, they naturally tried as a jury will do to help the one who had nothing and found themselves in prison, for the English law has never dealt kindly with illegitimates.

Still another case²⁷ shows an entry for condition broken. Robert had disseised Richard and the assize found in Richard's favor, but the twenty-four said that Robert had given the land to Richard on condition that Richard marry his daughter and Richard did not marry her, whereupon Robert had entered, but did not disseise Richard, who had never had seisin. The note to this case says that a certain man who gave land to another could disseise him for breach of the condition, but if this is Bracton's note, he missed the point. The legal conclusion in the attaint verdict is that the grantee was not in seisin at all until he performed the condition. Bracton makes the condition subsequent, but the jury made it precedent.

These cases show that the attaint is an effective remedy. No case appears where it is applied to any other sort of verdict than that of an assize. In actions where there was no jury as, for instance, in debt or detinue, there was no room for its application, since the old

²⁵ Bracton's Note Book, case No. 917.

²⁶ Bracton's Note Book, case No. 1209.

²⁷ Bracton's Note Book, case No. 1906.

wager of law still existed. If it had been applied to the oath of the supporting witnesses in wager of law, that defense would at once have ceased to exist. But there is a large number of actions in Bracton's Note Book where a body called a jury (*jurata*) was used. The most important of those actions were writs of entry and a word must now be said regarding them.

(To be continued.)

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